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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY VILLAVICENCIO,

Defendant and Appellant.

E069463

(Super.Ct.No. BLF1600114)

OPINION

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge.

Affirmed with directions.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant, Anthony Villavicencio, appeals from the judgment entered following jury convictions for two counts of assault with force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4); counts 1 & 2)¹ and four counts of battery (§ 242; counts 3-6). In a bifurcated court trial, defendant admitted three prior strike convictions (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)), one serious felony conviction (§ 667, subd. (a)), and two prison priors (§ 667.5, subd. (a)). The trial court sentenced defendant to 26 years to life in state prison.

Defendant contends the trial court erred in denying his Sixth and Fourteenth Amendment rights to self-representation by denying his *Faretta*² motions. Defendant argues that allowing him to represent himself would not have delayed his trial and was not intended to obstruct the orderly administration of justice. We conclude the trial court did not abuse its discretion in denying defendant's self-representation requests.

Defendant also asserts, and the People and this court agree, that the October 2, 2017, minute order and abstract of judgment should be corrected to reflect that defendant was convicted in counts 1 and 2 of violating section 245, subdivision (a)(~~4~~), not subdivision (a)(~~1~~). Therefore, the judgment is affirmed, but the October 2, 2017, minute

¹ Unless otherwise noted, all statutory references are to the Penal Code.

² *Faretta v. California* (1975) 422 U.S. 806, 807 (*Faretta*).

order and abstract of judgment must be amended to show that defendant is convicted in counts 1 and 2 of violating section 245, subdivision (a)(4).

II.

FACTS

On January 22, 2016, defendant was an inmate at Ironwood State Prison, serving a 25-year-to-life term. About 1:20 p.m., defendant and a few other inmates were out in yard A, standing in a breezeway. California Department of Corrections and Rehabilitation (CDCR) Correctional Officer Olvera was working as a yard officer, overseeing a yard crew of inmates responsible for picking up trash. When Olvera opened the breezeway door for the inmates to get the trash carts, she heard defendant tell another inmate, “F--- that bitch. Let her do it herself.” Defendant continued talking as he pushed a trash cart out the door. When Olvera secured the door, she heard defendant yell. She turned around to face him. Defendant said to her, “I don’t know what the f--- your problem is with me.” Defendant approached Olvera. He seemed angry.

Olvera called to the observation guard and told him to put the yard down. An alarm sounded. All of the inmates except defendant got down on the ground. Defendant continued to approach Olvera. Defendant lunged at Olvera and grabbed her hair. He struck her in the face, shoulder, and rib cage with a closed fist. Olvera believed defendant struck her six to nine times.

CDCR Correctional Officer Hernandez, who was standing nearby, saw defendant attack Olvera. Hernandez ran toward them and drew her baton. Hernandez told

defendant to get down on the ground. Defendant continued punching Olvera. Hernandez struck defendant twice in the back with her baton. Defendant continued punching Olvera. As Hernandez was about to strike defendant again, he came toward her. With her baton raised, Hernandez shouted, ““Stop.”” Defendant continued coming toward her. As Hernandez swung her baton, defendant blocked it and punched her in the face. Hernandez fell to the ground. Defendant jumped on top of her and punched her eight or nine times in the face with a closed fist. Other CDCR correctional officers intervened and pulled defendant off Hernandez.

Olvera and Hernandez were taken by ambulance to the hospital. Olvera spit out pieces of her teeth, was bleeding from her ear and forehead, had a swollen eye, and had a lump on her head. Olvera required three dental implants. She also suffered a “massive headache for days,” a concussion, shoulder pain, and post-traumatic stress disorder. Olvera was off work for about eight months because of the attack. At the time of defendant’s trial, she continued to suffer from anxiety, sleeplessness, forgetfulness, and headaches. Hernandez’s injuries from the attack included ringing in her left ear, a bruised sore eye, severe head pain, and bruises and scratches on her arms and fingers.

III.

DEFENDANT'S *FARETTA* MOTIONS

Defendant contends the trial court erred in denying his *Faretta* motions. We conclude there was no abuse of discretion in denying the motions.

A. Procedural Background

During the prosecution of the criminal charges against defendant in this case, defendant made six *Marsden*³ motions requesting new counsel, and two *Faretta* motions requesting to represent himself. On December 16, 2016, the court granted defendant's first *Marsden* motion. One month later, on January 20, 2017, the court granted defendant's second *Marsden* motion, resulting in the court vacating the preliminary hearing. On March 22, 2017, the court granted defendant's third *Marsden* motion. The court warned defendant that granting the motion would delay the preliminary hearing. Attorney Ronald Hettana was appointed as defendant's new attorney. On April 14, 2017, the court denied defendant's fourth *Marsden* motion. The preliminary hearing was on calendar for the following Monday. Defendant's fifth *Marsden* motion was denied on May 15, 2017.

On September 14, 2017, the day defendant's trial was scheduled to begin, the court heard and denied defendant's sixth *Marsden* motion. During the hearing, defendant's attorney, Hettana, informed the court that he had done most everything defendant had requested, including providing defendant with copies of most of the

³ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

discovery received, completing investigation in preparation for trial, and meeting with defendant. In response to the court denying his *Marsden* motion, defendant said he wanted to represent himself. The court told defendant he could request a hearing on his request, and defendant's attorney suggested the matter be heard at their next appearance on September 22, 2017. Defendant's trial was then ordered trailed to September 22, 2017, with the last day to commence trial on September 29, 2017.

On September 22, 2017, the parties announced ready for trial and defendant's trial was trailed to September 26, 2017. On September 26, 2017, the day before jury selection, defendant told the court he wanted to represent himself. The court responded that he had not filed a *Faretta* motion. Defendant said he did not know that was required. The court asked if defendant was ready to go to trial and added that the court was required to grant a *Faretta* motion unless it would result in delay. Defendant said he wanted the trial continued for two months. The prosecutor told the court that the People were ready to proceed to trial. Fourteen witness subpoenas had been served, with eight witnesses lined up to testify. Defendant's attorney said he was also ready for trial. The court explained to defendant that the court was not required to continue the trial if his *Faretta* motion was untimely.

The court permitted defendant to fill out a form *Faretta* request during a recess in the proceedings on September 26, 2017. Defendant initialed and signed the form *Faretta* request (*Faretta* motion). After the recess, the court heard defendant's *Faretta* motion and denied it. During the hearing on the motion, the court told defendant that granting

his *Faretta* motion could delay the trial. The court explained that it denied the *Faretta* motion after taking into consideration “the totality of the circumstances, the number of witnesses, the complexity of the case,” and the fact defendant had made five *Marsden* requests (actually six). The court added that defendant “had ample opportunity in the past to request to represent yourself and now we’re on the eve of the trial—not the eve, but we’ve actually started the trial.”

The following day, the court and counsel conducted voir dire. The next day, on September 28, 2017, after Hernandez testified, defendant told the court he wanted to represent himself and would “pick up from right here. I’m not asking for a delay.” The court told defendant they would discuss the matter at the break. Defendant insisted he wanted to question Hernandez himself. The prosecutor agreed to keep Hernandez on recall and called the next witness, CDCR Correctional Officer Meka. After defendant’s attorney, Hettena, cross-examined Meka, defendant stated he wanted to act as his own attorney and question Meka. Defendant complained that Hettena was sabotaging defendant’s defense. The court told defendant his request would be discussed during the break. After the prosecution called its next witness, the court took a recess.

During the break, defendant told the court he was upset because Hettena’s cross-examination of the prosecution’s witnesses was benefitting the prosecution not defendant. Defendant added that Hettena did not even cross-examine Hernandez or take notes. Defendant believed he knew more than Hettena when it came to defendant’s defense, and Hettena was not listening to him. Defendant therefore pleaded with the court to allow

him to represent himself. Defendant said he was not asking to delay the trial if permitted to represent himself. He just wanted to be able to cross-examine Hernandez and Meka. The court noted Meka was not a good witness for either side, and probably hurt the prosecution more than he helped it.

The court asked Hettana if he had anything to add. Hettana said defendant was continually asking him questions, which made it difficult for Hettana to listen during the trial. Hettana believed defendant did not trust him or like him. Hettana stated he had to do what he believed was best for defendant strategically, but defendant did not like what Hettana was doing. Hettana explained his strategy regarding his cross-examination of the prosecution's witnesses. The prosecutor said she had two more witnesses. Hettana told the court he was not planning to call any witnesses.

The court then addressed defendant's request to represent himself, explaining that the court was required to consider the quality of defendant's representation, defendant's reasons for requesting self-representation, and whether allowing defendant to represent himself would delay the trial. Defendant said he did not intend to delay the trial, which was anticipated to end the following day. He just wanted to cross-examine the prosecution's witnesses. Defendant admitted he hit an officer three times but denied he hit more than one officer and denied he hit the officer nine times. Defendant believed the officers were lying, and he believed Officer Rubio, who transported defendant to court, knew this. Defendant believed Rubio overheard the prosecutor and Hettana conspiring to convict defendant and ensure he received more prison time than he deserved. Defendant

told Hettena this. The prosecutor denied she was involved in such a conspiracy or had such a conversation with Hettena.

The court mentioned the option of appointing standby counsel for defendant in the event he represented himself. Defendant said he was not asking for standby counsel because he did not need standby counsel. Defendant wanted to cross-examine the officers because they were lying. He said he would tell Olvera that he “f----- up and I’m sorry,” but he knew she was lying.

The court took a recess and, upon reconvening, discussed defendant’s *Faretta* motion. The court told defendant that the court was required to consider the factors in *People v. Windham* (1977) 19 Cal.3d 121 (*Windham*), which included “the number of witnesses, whether or not there’s critical witnesses available, complexity of the case, the status of pretrial proceedings, opportunities to represent yourself in the past. And then we had the other part, the mid-trial one, where I’m supposed to think about defense counsel’s quality of representation, Mr. Hettena’s quality of representation, the reasons you’re requesting it, and if there’s going to be any delay. He told me there is no delay. [¶] You’re questioning the quality of Mr. Hettena’s representation, and that’s primarily the reason for your request. I know you’re upset, but I don’t think it would be to your advantage to . . . switch horses in the middle of the stream.”

The court further noted that the prosecution intended to call only two more witnesses. The witnesses were CDCR officers who were believed to have tackled defendant and removed him from Hernandez. The prosecutor told the court she believed

they were not the officers who injured defendant. Hettena stated that their testimony was not relevant to defendant's defense because their acts were committed after defendant committed the charged offenses of striking the victims. Hettena further stated that he believed defendant's collusion accusation against him was "completely preposterous and unfounded."

According to Hettena, the only real issue was how severe the victims' injuries were for purposes of proving great bodily injury and whether defendant acted with malice aforethought. The prosecution added that, even if defendant were permitted to represent himself, all examination had been completed with the exception of the two remaining witnesses. Therefore, defendant could not question the prosecution's previous witnesses unless they were recalled, and they could not be questioned again on the same matters already covered.

The court then noted that he had previously denied defendant's *Marsden* motion for a new attorney, and at the start of the trial, had denied defendant's previous *Faretta* motion to represent himself. The court stated that it still believed it was best to deny defendant's subsequent mid-trial request to represent himself based on the need for "continuity of the trial" and the factors he previously mentioned. After the court denied defendant's mid-trial *Faretta* motion, the court resumed the jury trial with the prosecution only calling one additional witness before resting its case. The defense did not call any witnesses and rested the next day.

B. Law Applicable to *Faretta* Motions

A criminal defendant has a federal constitutional right to represent himself at trial. (*Faretta, supra*, 422 U.S. at p. 807.) The right is absolute and unconditional, if knowingly and voluntarily made and if asserted “within a reasonable time prior to the commencement of trial.” (*Windham, supra*, 19 Cal.3d at p. 128.) There is no fixed time before trial when a *Faretta* motion is considered untimely. The motion is untimely if made on the “eve of trial,” or when the case is being continued on a day-to-day basis. (*People v. Clark* (1992) 3 Cal.4th 41, 99-100; see also *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205.) Under *Windham*, a motion is timely if made “a reasonable time prior to the commencement of trial.” (*Windham, supra*, at p. 128, fn. omitted.) “[O]nce a defendant has chosen to proceed to trial represented by counsel, a defendant’s motion for self-representation is ‘addressed to the sound discretion of the court.’” (*People v. Lynch* (2010) 50 Cal.4th 693, 722 (*Lynch*).)

The purpose of the timeliness requirement is “to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.” (*Lynch, supra*, 50 Cal.4th at p. 722, quoting *People v. Burton* (1989) 48 Cal.3d 843, 852.) The timeliness requirement “reflects that ‘the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.’ [Citation.] Despite this tacit approval of the timeliness limitation on the self-representation right, the high court has never delineated when a motion may be denied as untimely. Nor has this court fixed any definitive time

before trial at which a motion for self-representation is considered untimely, or articulated factors a trial court may consider in determining whether a self-representation motion was filed a reasonable time before trial.” (*Lynch, supra*, at p. 722.)

The California Supreme Court has held on numerous occasions that *Faretta* motions made on the eve of trial are untimely. (*Lynch, supra*, 50 Cal.4th at p. 722; *People v. Frierson* (1991) 53 Cal.3d 730, 742 [held a self-representation motion made on September 29, 1986, when trial was scheduled for October 1, 1986, was made on “the eve of trial” and was untimely]; *People v. Valdez* (2004) 32 Cal.4th 73, 102 [*Faretta* motion made “moments before jury selection was set to begin” deemed untimely]; *People v. Horton* (1995) 11 Cal.4th 1068, 1110 [*Faretta* motion made on the date scheduled for trial untimely]; *People v. Clark, supra*, 3 Cal.4th at pp. 99-100 [August 13 motion was “in effect the eve of trial” and untimely, where case continued day-to-day after August 10 “in the expectation that the motions would be concluded and jury selection set to begin at any time”].)

“[T]imeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made. An analysis based on these considerations is in accord with the purpose of the timeliness requirement, which is ‘to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.’” (*Lynch, supra*, 50 Cal.4th at p. 724, quoting *People v. Burton, supra*, 48 Cal.3d at p. 852; see also *People v. Marshall* (1997) 15 Cal.4th 1, 23.)

Once the trial has begun, the defendant's right to self-representation is sharply curtailed. (*Windham, supra*, 19 Cal.3d at p. 126.) Thereafter, it is "within the sound discretion of the trial court" to deny the motion after inquiring into the specific factors underlying the request. (*Id.* at pp. 124, 128.) Among the factors to be weighed by the court in reaching its decision are the reasons for the request, the quality of counsel's representation, the length and stage of the proceedings, the disruption and delay which might be expected if the request is granted, and defendant's prior proclivity to substitute counsel. (*Id.* at p. 128.) The prejudice to the defendant's legitimate interests must outweigh the potential disruption of the proceedings, and this court must give considerable weight to the trial court's exercise of its discretion in denying an untimely motion. (*Id.* at p. 126.)

The California Supreme Court in *Lynch* likewise concluded that "a trial court may consider the totality of the circumstances in determining whether a defendant's *pretrial* motion for self-representation is timely. Thus, a trial court properly considers not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation." (*Lynch, supra*, 50 Cal.4th at p. 726, italics added.) A defendant's disagreement with his counsel over trial tactics is not a sufficient reason to grant an

untimely *Faretta* motion. (*People v. Scott, supra*, 91 Cal.App.4th at p. 1206; accord, *People v. Wilkins* (1990) 225 Cal.App.3d 299, 309, fn. 4.)

C. Defendant's Faretta Motions Were Untimely

Defendant contends the trial court erroneously denied his *Faretta* motions to represent himself. We disagree because defendant's motions were untimely. (*Lynch, supra*, 50 Cal.4th at p. 722; *Windham, supra*, 19 Cal.3d at pp. 127-128.)

Before defendant made his two *Faretta* motions, defendant had made six *Marsden* motions, with the first motion made in December 2016, and the sixth motion made on September 14, 2017, the day defendant's trial was scheduled to begin. The trial was trailed thereafter until September 26, 2017. In response to the court denying defendant's sixth *Marsden* motion on September 14, 2017, defendant said he wanted to represent himself, but did not follow-up on his request. (*People v. Ruffin* (2017) 12 Cal.App.5th 536, 545 [a motion for self-representation made in passing anger or frustration may be denied].) Defendant's attorney noted defendant could do that at their next appearance on September 22, 2017, but the record does not show defendant requested self-representation that day and therefore he forfeited his initial request to represent himself. (*People v. Kenner* (1990) 223 Cal.App.3d 56, 61-62 [where the defendant had both time and opportunity to follow up on his request for a *Faretta* motion hearing, and failed to do so, he is deemed to have abandoned or withdrawn his self-representation request].) Defendant did nothing in furtherance of representing himself until defendant made a *Faretta* motion on September 26, 2017, the day defendant's trial was scheduled to begin.

1. *September 26, 2017, Faretta Motion*

On September 26, 2017, defendant filed a form *Faretta* motion, which the court heard that same day. The court discussed defendant's concerns regarding his trial attorney, Hettena, representing him and defendant's desire to represent himself. During the hearing, the court considered the *Windham* and *Lynch* factors in determining whether to grant defendant's *Faretta* motion. (*Windham, supra*, 19 Cal.3d at p. 128; *Lynch, supra*, 50 Cal.4th at p. 723.) The court reasonably concluded the factors weighed heavily in favor of denying defendant's September 26, 2017, *Faretta* motion. Defendant's attorney, Hettena, was an experienced defense attorney. During the motion hearing, he told the trial court his investigation was complete, he had met with defendant, he had provided him with the requested discovery, and Hettena was ready to go to trial. The court reasonably concluded Hettena was providing defendant with good representation.

As to defendant's prior proclivity to substitute counsel, this factor also supported denying defendant's *Faretta* motion. The trial court noted defendant had made five *Marsden* motions. Defendant had actually made six *Marsden* motions, the first three of which were granted. The sixth motion was made on the eve of trial. Defendant's subsequent three *Marsden* motions, made after Hettena was appointed defense counsel, were denied because the court found that Hettena was representing defendant well and had done the majority of what defendant had requested, with the exception of those things which were not possible or which Hettena believed were not strategically advisable. Defendant's sixth *Marsden* motion, which the court denied on September 14,

2017, was made on the day trial was scheduled to begin but was trailed. During that same hearing, in response to the court denying his *Marsden* motion, defendant said he wanted to represent himself, but did nothing further in this regard until he filed a form *Faretta* motion on September 26, 2017.

As to the factor of defendant's reasons for wanting to represent himself, defendant told the court he believed Hettana was not doing a good job and defendant wanted to cross-examine the prosecution's witnesses himself. But the trial court reasonably concluded Hettana was an experienced defense attorney, who was doing a good job, and defendant likely would not benefit from representing himself.

The timeliness factor also weighed in favor of denying defendant's September 26, 2017, *Faretta* motion. Defendant requested a two-month continuance to prepare for representing himself during the trial. This meant that granting defendant's *Faretta* motion would result in delaying the trial after it had been trailing and was scheduled to begin that day. The court could reasonably infer that defendant's self-representation request was being used as a delaying tactic. (*People v. Burton, supra*, 48 Cal.3d at p. 854.) "The fact that the granting of the motion will cause a continuance, and that this will prejudice the People, may be evidence of the defendant's dilatory intent. Similarly, the defendant's pretrial delays, in conjunction with a motion for continuance for the purpose of self-representation, would be strong evidence of a purpose to delay." (*People v. Burton, supra*, at p. 854.)

Under the *Windham* factors, the trial court therefore did not abuse its discretion denying defendant's *Faretta* motion on September 26, 2017, because the motion was untimely. (*Windham, supra*, 19 Cal.3d at p. 128; *Lynch, supra*, 50 Cal.4th at p. 722 [*Faretta* motion filed two weeks before trial was untimely]; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 790-792 [trial court did not abuse discretion in denying *Faretta* motion made six days before trial, where no showing of reasonable cause was made for its lateness, and continuance would have prejudiced prosecution's case]; *People v. Hall* (1978) 87 Cal.App.3d 125, 132 [motion on morning of trial at last possible moment before trial began, accompanied by request for continuance, was untimely].)

The trial court also properly denied defendant's September 26, 2017, *Faretta* motion based on the *Lynch* factors. The motion was heard on the date the trial was scheduled to start, jury selection was scheduled to start the next day, trial counsel for the prosecution and defense were ready to proceed to trial, and the prosecution had subpoenaed 14 witnesses, with eight witnesses lined up to testify during the next two days. In addition, defendant had previously made numerous requests to change his attorney and had ample opportunity to assert his right to request self-representation earlier in the proceedings before the trial was scheduled to begin. Nevertheless, defendant did not file a *Faretta* motion until September 26, 2017. (*Lynch, supra*, 50 Cal.4th at p. 726.)

Under the *Windham* and *Lynch* factors, the trial court did not abuse its discretion by denying defendant's untimely motions for self-representation. The parties were ready to proceed, defendant did not offer any justification for his untimely request to represent himself, and granting his September 26, 2017, *Faretta* motion was reasonably likely to result in substantial delay and disruption of the proceedings. (*Lynch, supra*, 50 Cal.4th at p. 728.)

2. September 28, 2017, *Faretta* Motion

Defendant's September 28, 2017, *Faretta* motion was even more untimely. It was made near the end of the trial. The grounds for the motion were almost identical to defendant's September 26, 2017, *Faretta* motion. Defendant stated he was dissatisfied with Hettena's performance during the trial and incensed with his failure to listen to defendant. The grounds for denying defendant's September 28, 2017, *Faretta* motion were even stronger than those supporting denial of defendant's earlier motion because the trial was almost over when defendant made his September 28, 2017, motion.

During the hearing on the motion, the prosecutor informed the court that she intended to call only two more witnesses. Defendant's attorney stated that he anticipated not calling any defense witnesses unless defendant wanted to testify. It was anticipated the trial would end the following day, with commencement of jury deliberations. Defendant stated that if he were permitted to represent himself, he would not request a trial continuance. He said he simply wanted to cross-examine the prosecution's witnesses, including those whom his attorney had already had an opportunity to cross-

examine. Because defendant had stated during his previous *Faretta* motion that he would need two months to prepare for trial, the trial court reasonably concluded that granting defendant's mid-trial motion would result in delaying completion of the trial.

We conclude under *Windham* and *Lynch*, defendant's *Faretta* motions, made on the day defendant's trial began and near the end of the trial, were untimely. (*Lynch*, *supra*, 50 Cal.4th at pp. 722-723; see also *People v. Carlisle* (2001) 86 Cal.App.4th 1382, 1390 [trial court did not abuse its discretion in denying self-representation request made on day of trial]; *People v. Harris* (1977) 73 Cal.App.3d 76, 81 [trial court did not abuse discretion in denying as untimely *Faretta* motion on second day of trial].) Therefore, the trial court did not abuse its discretion in denying defendant's *Faretta* motions.

IV.

INCORRECT STATUTE SUBDIVISION FOR COUNTS 1 AND 2 STATED IN MINUTE ORDER AND ABSTRACT OF JUDGMENT

Defendant correctly asserts, and the People agree, that the October 2, 2017, minute order, verdict forms, and abstract of judgment incorrectly state that defendant was convicted in counts 1 and 2 of violating section 245, subdivision (a)(1) (assault with a deadly weapon, a serious felony). The record shows that defendant was actually charged and convicted in counts 1 and 2 of committing assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), which is not a serious felony. (*People v. Gallardo* (2017) 4 Cal.5th 120, 125.)

The court sentenced defendant properly on counts 1 and 2 as if the convictions were for violations of section 245, subdivision (a)(4). Therefore, defendant's sentence on these counts is proper. However, the October 2, 2017, minute order and abstract of judgment should be corrected to reflect that defendant was convicted in counts 1 and 2 of violating section 245, subdivision (a)(4).

V.

DISPOSITION

The judgment is affirmed. However, the trial court is directed to amend the October 2, 2017, minute order and the CDCR is directed to correct the abstract of judgment to correctly state that defendant is convicted in counts 1 and 2 of violating section 245, subdivision (a)(4).

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.